No. 09-1310

IN THE

Supreme Court of the United States

JILL LINDSAY, *et al.*,
Petitioners,

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS AND JOHN WARD, AS PRESIDENT OF APFA

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May 28, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below, after determining on the record presented and consistently with decisions of this Court that there was no basis for plaintiffs' claims that the Association of Professional Flight Attendants breached the federal duty of fair representation ("DFR") in its negotiation and ratification of a collective bargaining agreement aimed at forestalling a credible, imminent threat of a bankruptcy filing by American Airlines, correctly also determined that plaintiffs' state law claims, predicated upon the same facts as their unsuccessful DFR claims (which they no longer are pursuing), are preempted?

2. Did the court below, after reviewing the text and structure of the Railway Labor Act ("RLA") and applicable case law, correctly determine that individual employees cannot pursue claims against their employer that seek to invalidate a collective bargaining agreement (negotiated by their union and ratified by the employees) under the RLA "status quo" provisions, Section 2, First and Seventh, 45 U.S.C. § 152, First and Seventh?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondents Association of Professional Flight Attendants ("APFA") and John Ward, as President of APFA, hereby state that APFA is an unincorporated association, that John Ward, as President of APFA, is an individual, that neither APFA nor John Ward has any parent corporation, subsidiary or affiliate, and that no public company owns 10% or more of stock in either APFA or John Ward (there being no such issued stock).

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BRIEF IN OPPOSITION OF RESPONDENTS ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS AND JOHN WARD, AS PRESIDENT OF APFA

STATEMENT OF THE CASE

Following the catastrophic events of 9/11, American Airlines ("American" or "the Company") lost billions of dollars. By early 2003, with its condition rapidly worsening, the Company threatened to file for bankruptcy unless all three unions representing its employees (including respondent Association of Professional Flight Attendants ("APFA" or the "Union")) entered into and ratified highly concessionary agreements by a very tight, Company-dictated deadline,

and, if it filed for bankruptcy, to ground many aircraft, seek far greater concessions and furlough thousands more flight attendants than if it reached agreements outside of bankruptcy.

After the three unions' financial advisors concluded that the Company's bankruptcy threat was well founded, APFA's Board of Directors ("BOD"), its highest governing body, made a series of difficult decisions that it believed in good faith would best protect the American flight attendants' interests: (1) to negotiate a concessionary agreement with American (which became the "Restructuring Participation Agreement" or "RPA"); (2) to substitute an expedited 15-day telephonic member ratification process for the Union's normal 30-day mail ballot (in order to meet the Company's ratification deadline); (3) to accept American's offer to defer the threatened bankruptcy by one day in order to extend member balloting; and (4) to resolve a new dispute with American over executive benefits that arose after the RPA had been ratified and in the face of a renewed Company bankruptcy threat.

The thrust of plaintiffs' lawsuit was that these collective bargaining actions breached APFA's duty of fair representation ("DFR"), that American was a party to those breaches, and that the RPA should be vacated and the prior non-concessionary 2001 collective bargaining agreement (the "2001 CBA") should be restored. The Second Circuit unanimously affirmed the district court's determination, based on a detailed record and governing decisions of this and other Courts, that there was no basis for plaintiffs' claims. Among other things, the courts concluded that the circumstances then confronting APFA, including American's dire economic straits and bankruptcy

threat, "preclude any reasonable factfinder" from concluding that APFA's decisions related to the RPA negotiations and ratification were made "irrationally, arbitrarily, or in bad faith," and that plaintiffs' state law claims, based on the same allegations as the DFR claims, were preempted. Pet., pp. 21a-24a, 26a-29a (Second Circuit), 84a-90a (district court).[1]

Plaintiffs have now abandoned their DFR claims and seek review only of the dismissal of their state law claims (brought against APFA and American) and of certain claims brought against American under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*

1. The Facts

APFA's "industry-leading" 2001 CBA, obtained after years of negotiations with American, was overwhelmingly ratified by the APFA membership on September 12, 2001. Pet., p. 36a. There was no membership celebration, however; the previous day two American aircraft were hijacked and destroyed, and colleagues' lives were lost. JA-3522. In the aftermath of 9/11, American suffered billions in losses in 2001 and 2002. Pet., p. 37a. When American projected even greater losses in the first quarter of 2003, it demanded in February 2003 that the three unions representing Company employees[2] agree to massive concessions (including $340 million annually

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[1] "Pet., p. __" refers to the petition for a writ of certiorari. "Pet., p. __a" refers to the appendix annexed to the petition wherein the lower court opinions in this case are reproduced. "JA-___" refers to the documents in the joint appendix submitted to the court of appeals.

[2] The Allied Pilots Association ("APA") represents American's pilots; the Transport Workers Union ("TWU") represents certain American ground employees. Pet., p. 37a; JA-3485, JA-5119 (¶ 29).

from APFA) by March 31, and obtain membership ratification by April 15, or the Company would file for bankruptcy. Pet., pp. 38a-40a, 44a; *see* Pet., pp. 41a-42a, 45a; *see also* Pet., pp. 46a-47a (American intended to file for bankruptcy absent concessionary agreements). The financial advisors for all three unions, after a thorough review of Company and public data, concluded that an imminent bankruptcy filing was highly likely unless the unions agreed to the Company-mandated cost reductions and deadlines. Pet., pp. 40a-42a, 86a; JA-4042.

APFA decided to negotiate an agreement with American "in order to avoid [an American] bankruptcy," Pet., p. 40a, but before APFA agreed to the level of concessions the Company demanded (as did APA and TWU, *see* JA-2457, JA-5146 (¶ 67); JA-3505, JA-5125 (¶ 101)), it attempted, unsuccessfully, to negotiate "upsides" to partly offset the concessions, Pet., p. 46a, and considered American's dire financial condition, as well as the Company's bankruptcy plan, shared with APFA and the flight attendants, to seek, through rejection of the 2001 CBA (under Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113), 40% greater cost reductions ($470 million annually) and to furlough 2,500 more flight attendants than under an agreement reached outside of bankruptcy. Pet, pp. 40a-44a, 46a-47a, 84a-85a. And, before the BOD decided to conduct an expedited telephonic ratification vote under these unanticipated, emergency circumstances, it considered not only the views of those who drafted the APFA Constitution, Pet., pp. 49a-51a, but also that if it used a 30-day mail ballot, the vote would not conclude until after the Company had filed for bankruptcy, rendering the vote symbolic and meaningless. Pet., pp. 49a-51a; *see* JA-326; JA-3500-01; JA-3990.

Throughout the negotiations and ratification process, the APFA leadership kept its members fully informed with contemporaneous updates regarding the existing circumstances and the BOD's actions and reasoning. Pet., pp. 43a-44a, 51a-53a. Before the ratification balloting began, APFA provided its members with "a detailed description of the RPA's terms," Pet., p. 52a, making no effort to hide their "ugliness." JA-3591; JA-3546-47; Pet., p. 53a. (Nevertheless, APFA strongly recommended that flight attendants defer voting until they received final contract language, for which APFA was urging American's prompt agreement. Pet., p. 52a; JA-3501, JA-5121 (¶ 85); JA-3548).

Notwithstanding APFA's agreement to the RPA, subject to membership ratification, it thereafter pursued and obtained American's agreement to several improvements to lessen the RPA's impact (shorter duration, early reopening option, potential additional mid-term wage increases, earlier vesting of stock options), without providing any offsetting concessions to American. Pet., p. 53a.

Prior to April 15, APFA President Ward "consistently sought more [voting] time for APFA members" Pet., pp. 53a-54a, 85a-86a, but the Company refused to extend the deadline until finally, in the early morning on April 15, it offered a one-day extension. Pet., pp. 49a, 53a-54a. Ward considered the offer insufficient and did not accept it, *contra* Pet., pp. 29-30 n.21 (¶¶ 4-5), but agreed to refer it to the BOD for consideration. Pet., pp. 54a, 85a. By the time the BOD met later that day, it was aware that APA and TWU had ratified their RPAs and that, as of 10 AM on April 15, the APFA RPA had been narrowly rejected (9,842 "no" to 9,309 "yes"). Pet., p. 55a. The BOD carefully weighed the issues and alternatives, found

multiple compelling reasons why an extension—which the Union had been seeking all along—would further "the best interests of the membership" (as detailed in the district court's findings, Pet., pp. 55a-56a), and also determined to offer flight attendants the same option the other two unions had given their members to change their initial vote if they so desired. Pet., pp. 55a-56a, 85a-86a.[3] During the balloting extension, *all* members were afforded the opportunity to vote for the first time (approximately 1,300 did), to revote (either as they had previously or by changing their vote), or to refrain from voting (in which case their prior vote, if any, would be counted). Pet., p. 57a.

During the extension, the Company communicated to flight attendants regarding the continued prospect of a bankruptcy filing, as it had throughout and before the balloting period, which evoked an immediate protest by Ward. Pet., pp. 57a-61a.

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[3] Plaintiffs allege certain shortcomings with the ratification voting that all pertain to their now abandoned DFR claims, are irrelevant to the issues for which they seek review, and are contrary to the record. For example, *contra* Pet., pp. 29-30 n.21 (¶¶ 1-4), no one knew how any flight attendant voted and there is no evidence that vote "monitoring" was used in any way by APFA or motivated the Company to agree to RPA enhancements or offer to extend the balloting. JA-552; JA-599-601; JA-892; JA-3511, JA-5129 (¶ 128); JA-3670; JA-3675; JA-3725; JA-3736-37; JA-3807-10; JA-4013. Also, no evidence exists that the vote-change option "compromise[d] the vote's integrity" or that the BOD "knew" that it would, *contra* Pet., p. 4 n.1; *see* JA-4992-93 (¶¶ 89-91); on the contrary, the American Arbitration Association ("AAA"), which conducted the balloting, Pet., p. 51a, used extensive safeguards during the extension to ensure voting integrity. JA-524; JA-586; JA-727-28; JA-1253; JA-1264; JA-1271-73; *see* Pet., p. 57a.

At the conclusion of balloting on April 16, the final tally was 10,761 "yes" votes and 9,652 "no" votes,[4] the AAA certified the results, and APFA and American then considered there to be a ratified RPA. Pet., p. 57a; JA-1468.

The next morning, the press reported that the Company had provided executives with retention bonuses and funded a special bankruptcy-shielded retirement plan. Pet., p. 61a. APFA expressed its outrage for what it considered a deliberate Company failure to timely disclose this significant information to APFA and the flight attendants, JA-3512, JA-5129 (¶ 132), threatened to reballot the APFA membership on the RPA (as did TWU with its membership, JA-3684), and took steps to do so at an April 22 BOD meeting. Pet., p. 62a.

After an all-day meeting on April 23 among top officers of the Company and the three unions and four Texas Congressional representatives, the Company agreed to additional RPA improvements (further shortening the duration of the three RPAs, an even earlier reopening option, a new Annual Incentive Program more likely to result in payments to employees than the plan already included in the RPAs). Pet., pp. 62a-63a, 65a-66a; JA-3819-21. Due largely to insistence by all three unions, American's CEO (Don Carty) resigned on April 24. Pet., p. 63a. APA and TWU thereafter dropped any further challenge to finalization of their RPAs, but APFA did not. Pet., p. 63a; JA-3685. Instead, its officers met that

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[4] Plaintiffs' argument that votes cast during the extension were "void" and that only votes cast prior to the extension were "valid," Pet., pp. 4 n.1, 29-30 n.21 (¶ 5), rests on their (incorrect) contention that the BOD could not authorize a voting extension.

evening with the new American CEO (Gerard Arpey) and urged him to defer a bankruptcy filing until after APFA reballoted its membership on the RPA. Pet., p. 63a. Arpey refused. JA-3685-86. However, he agreed to a specific further change in the APFA RPA that the Union had been seeking, conditioned upon APFA's acceptance by the morning of April 25 and withdrawal of its decision to reballot the membership, absent which the Company would file for bankruptcy. Pet., p. 63a.

Faced once again with highly undesirable alternatives, the BOD determined, on the morning of April 25, to finalize the RPA without a further membership vote and to secure the RPA improvements to which the Company had agreed after APFA's reballoting threat (which, *contra* Pet., pp. 29-30 n.21 (¶ 8), did not require membership ratification because these additional changes were all beneficial to the membership and caused no "major changes" to pay or work rules). Pet., pp. 63a-66a; JA-779-80; JA-3529; JA-3933-34; JA-4064. The Letter of Agreement signed on April 25, by its terms, "resolve[d] all disputes which exist[ed] between [APFA and American] related to the negotiation, ratification, and final effectiveness of the Restructuring Agreement, dated April 16, 2003." Pet., p. 65a; JA-4138-41. The RPA was implemented in May 2003. Pet., p. 66a. It is this agreement, in effect for seven years, that plaintiffs seek to vacate and replace with the pre-existing 2001 CBA. JA-136.

2. Proceedings Below

Plaintiffs filed a 534-paragraph, 22-count class action complaint in which they challenged APFA decisions and American actions related to the negotiation and ratification of the RPA. JA-42-137. They alleged that APFA breached its DFR (five of their causes of

action) and violated its Constitution, the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401, *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*. They asserted claims against American for violations of the RLA, state law and RICO, and for its participation in APFA's purported DFR breaches. Plaintiffs sought to vacate the RPA, to resurrect the 2001 CBA, and hundreds of millions of dollars in damages.

(a) District Court

In March 2006, the district court dismissed the RICO claim, two of three LMRDA claims (plaintiffs subsequently withdrew the third), and all state law claims against American as preempted. Following extensive discovery, the parties filed summary judgment motions.

In July 2008, the court granted defendants' motions, denied plaintiffs' motion and dismissed as moot plaintiffs' class certification motion. In doing so, the district court followed the teachings of *Air Line Pilots Ass'n, International v. O'Neill*, 499 U.S. 65 (1991), and its progeny, that a union fulfills its DFR when it considers the existing factual landscape in determining how best to protect those whom it represents, that the union's judgment calls are not to be second-guessed, even if others, including courts, might disagree with them, that a union's constitution is not a straitjacket that bars a union from responding effectively to dire circumstances in order to protect its members, and that a union does not breach its DFR unless its conduct is "so far outside a 'wide range of reasonableness' as to be wholly irrational," discriminatory, or taken in bad faith, *id.* at 67. The district court applied these standards to the record

facts and determined that "[a]ll evidence indicates that APFA's motive was to avoid an American bankruptcy and thereby preserve its members' interests" and that "no reasonable jury could find" that APFA breached its DFR. Pet., pp. 88a-89a.

Among other things, the court found that: (1) APFA's actions were "rational" and neither arbitrary, in bad faith nor discriminatory, as the Union was "faced with the credible threat" that, if it did not reach and ratify a concessionary agreement by the American-required deadlines, the Company would file for bankruptcy and would furlough far more flight attendants and seek substantially greater concessions; (2) "APFA's acceptance of American's offer for an extension . . . cannot be viewed as arbitrary or in bad faith" because Ward "consistently sought more [ballot] time for APFA members to consider the proposed RPA"; and (3) there was "no evidence" that APFA's decision to enter the April 25 Agreement without membership ratification was "irrational," "fraudulent" or "invidious" as the Union acted on "its reasonable fear that American would file for bankruptcy in the absence of agreement." Pet., pp. 84a-86a.

The district court also concluded that because the allegations underlying plaintiffs' state law breach of Union Constitution claim were the same as those on which the DFR claims were based, the state claim was a "mere refinement" of the DFR claims and therefore "preempted by federal law." Pet., p. 90a.[5]

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[5] In a related case brought by former flight attendants for TWA Airlines (following American's acquisition of TWA), the lower court denied the plaintiffs' motion to enjoin implementation of the RPA, *Cooper v. TWA Airlines, LLC*, 274 F.Supp.2d 231 (E.D.N.Y. 2003), and subsequently granted summary judgment for APFA, finding that "APFA did not discriminate

(b) Court of Appeals

The Second Circuit unanimously affirmed the district court rulings. In accord with *O'Neill*, 499 U.S. 65, and like the district court, it evaluated the Union's conduct in light of the factual circumstances confronting the Union at the time it made its various decisions. It found, among other things, that: "the record is replete with evidence that American Airlines was, in fact, in dire economic straits at the time the parties entered into the [RPA] negotiations"; these "circumstances preclude any reasonable factfinder from concluding that APFA entered into the challenged negotiations with American Airlines irrationally, arbitrarily, or in bad faith"; the evidence would not "admit an inference of arbitrariness or bad faith in the [expedited] voting procedures used by APFA" given the "time-sensitive nature of the circumstances"; "APFA [had] sought an extension [of balloting] through the end of April" and there is "no record evidence that would permit a factfinder to identify bad faith in APFA's acceptance" of the Company's offer of a one-day ballot extension; and there was "no record support for plaintiffs' claim that APFA acted arbitrarily or in bad faith in finalizing the April 25, 2003" Agreement that provided various benefits to the flight attendants, as American informed the Union that "if it did not finalize the [RPA] by April 25, the airline would declare bankruptcy." Pet., pp. 26a-29a.

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against or act in bad faith with regard to the TWA flight attendants [in breach of the DFR] in the negotiation of the RPA or with respect to the ratification of that agreement," and that plaintiffs' state law breach of constitution claim was "preempted by federal law" because it was based on the same allegations, and thus a "mere refinement" of their DFR claim. *Cooper v. TWA Airlines, LLC*, 184 L.R.R.M. (BNA) 2801 (E.D.N.Y. 2008) (citation omitted). This decision was not appealed.

In affirming the lower court's ruling that the RLA preempted the state law breach of Union Constitution claim against APFA, the court of appeals first reviewed a "basic tenet[]" of federal labor law that "uniform" federal standards (for unions, the DFR standard), not various state laws, are to govern the conduct of an RLA union and carrier pertaining to the formation of a collective bargaining agreement ("CBA"). Pet., pp. 17a-21a. It then observed that plaintiffs' state law claim against APFA was based on the same allegations underlying their DFR claims. Accordingly, the Second Circuit concluded that the state law claim was preempted, lest it "'frustrate effective implementation of the [RLA's] processes'" for reaching CBAs by imposing "additional state regulation on core RLA [union collective bargaining] conduct," Pet., pp. 21a-22a (quoting *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969), and further citing *id.* at 381); *see also* Pet., pp. 16a-17a, 23a-24a, 29a (plaintiffs' related state law claims against American, which on appeal were all linked to the state law claim against APFA, were similarly preempted).

The court affirmed dismissal of plaintiffs' RLA claims against American that also sought to supplant the RPA with the 2001 CBA, JA-82-83 (¶¶ 223, 233); JA-136. After reviewing the text and structure of the statute and applicable case law, the appellate court "conclude[d] that neither § 152, First nor § 152, Seventh [of the RLA] provides a private cause of action to individual employees . . . under the circumstances presented here," Pet., p. 16a, and that "the appropriate remedy for injuries of the sort plaintiffs allege is a claim against their union for breach of the [DFR]," Pet., p. 9a; Pet. pp. 6a-16a—a claim which, as noted, the court determined, and plaintiffs no longer dispute, plaintiffs could not establish.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE RULING BELOW THAT THE ISSUES PRESENTED IN PLAINTIFFS' CLAIMS ARE TO BE DETERMINED EXCLUSIVELY BY FEDERAL LABOR LAW IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS

A. Plaintiffs claim that the RPA—a CBA between parties (APFA and American) regulated by a federal statute (the RLA)—was unlawfully negotiated and ratified and the pre-concessionary 2001 CBA should be restored. *See* JA-136 (prayer for relief). This assertion directly implicates APFA's collective bargaining relationship with American and its representational conduct, both of which are at the core of federal labor policy and governed exclusively by the DFR. Pet., pp. 9a, 22a-24a; *Vaca v. Sipes*, 386 U.S. 171, 174, 177 (1967); *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). Accordingly, plaintiffs' attempt to vacate the RPA by challenging the Union's representational actions could only succeed through a showing that APFA breached its DFR and American was a party to that breach.[6] As both lower courts found, however, there was no evidentiary or legal basis for plaintiffs' five DFR claims and plaintiffs do not seek review of this conclusion.

Plaintiffs have now abandoned all their federal claims against APFA (they did not appeal from dismissal of their LMRDA and RICO claims) that were the focus of their lawsuit (nine of their ten claims

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[6] *See Humphrey v. Moore*, 375 U.S. 353, 373 (1964) (Goldberg, J. concurring).

against APFA were federal claims), and instead, before this Court, have placed exclusive attention on a parallel state law claim for breach of the APFA Constitution that, as plaintiffs acknowledge, is predicated on "the same nucleus of operative fact[s]" as their dismissed DFR claims. Pet., p. 29 n.21; Pet., pp. 22a-23a; Pet., p. 90a (district court stating same); *see* JA-84-85; JA-87-95. Because subjecting federally regulated labor law conduct to varying "state liability" standards would undermine the need for uniformity that underpins the "federal [labor law] scheme," the Second Circuit "easily conclude[d]" that this state law claim (and related state causes of action against American) are preempted by federal labor law. Pet., pp. 22a-24a. In so holding, the Second Circuit followed decisions of this Court that have been consistently applied by the lower courts.

B. A key tenet of federal labor law, under both the RLA and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*, is the need for uniformity in the regulation of union and employer collective bargaining conduct. *See, e.g., IAM v. Central Airlines, Inc.*, 372 U.S. 682, 685-86 (1963) (adding that state regulation of areas governed by RLA would impede RLA goal of minimizing interruption to nationwide transportation and resolving labor disputes peacefully).[7] As this Court emphasized in *Jacksonville*

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[7] *Accord Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 320-23 (3rd Cir. 2004) (RLA); *see also* Pet., p. 108a (district court decision; RLA governs the process of negotiation of CBAs). NLRA cases stressing the need for uniformity include *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1974), *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 286-87 (1986), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208-13 (1985). *See Lodge 76, IAM v. Wisconsin Employment Relation Comm'n*, 427 U.S. 132, 140 & n.4 (1976)

Terminal, "the imposition of inconsistent state obligations" on union and employer conduct regulated by federal labor law would disrupt the "uniform[]" federal labor law scheme and would be "fatal to the goals of the [RLA]." 394 U.S. at 381; *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 203 (5th Cir. 2001) (cited at Pet., p. 33) (federal labor preemption serves to preserve federal labor law "uniformity"); *Cooper v. TWA Airlines, LLC*, 349 F.Supp.2d 495, 505, 507 (E.D.N.Y. 2004). For similar reasons, it is federal labor law, not state law, that provides the standard for determining whether a "contract [under the RLA] is valid and enforceable according to its terms." *Central Airlines*, 372 U.S. at 691; *accord Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 232 (1956) ("A union agreement made pursuant to the Railway Labor Act has . . . the imprimatur of federal law upon it and . . . could not be made illegal nor vitiated by any provision of the laws of a State").

The DFR fits within and forms an essential part of this federal labor law scheme, prescribing the uniform obligations and standards for the union's performance of "all" representational conduct, *O'Neill*, 499 U.S. at 67, 77; *see also Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 202-03 (1942), including with regard to the negotiation and ratification of CBAs,[8] *contra* Pet., p. 32,

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(cited at Pet., p. 26 n.18) (federal law governs collective bargaining conduct).

[8] *Accord Vaca*, 386 U.S. at 181 (DFR applies to negotiation of CBA); *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979) (same); *Commc'n Workers v. Beck*, 487 U.S. 735, 743 (1988) (same); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-21 (11th Cir. 1988) (DFR applies to union's negotiation of concessionary agreement and its conduct during CBA's ratification); *Acri v. IAM*, 781 F.2d 1393, 1397 (9th Cir. 1986) (DFR applied to union ratification conduct); *Anderson v. United Paperworkers Int'l*

and in applying related internal union constitutional provisions or policies.[9] The DFR is "federal law . . . grounded in federal statutes," and is governed by "federal standards," *Vaca*, 386 U.S. at 174, 177; *accord Humphrey*, 375 U.S. at 341, 343-44, that are identical under the RLA and NLRA, *O'Neill*, 499 U.S. at 76; *Vaca*, 386 U.S. at 182-83; *Steele*, 323 U.S. at 202-03.

The application of uniform federal labor law standards to union conduct is reflected in: (a) the broad deference accorded to unions when reviewing their representational conduct, *e.g.*, *O'Neill*, 499 U.S. at 67, and their interpretations of their constitutions, *Sim*, 166 F.3d at 469-70; *James*, 302 F.3d at 1145-46,

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Union, 641 F.2d 574, 578-79 (8th Cir. 1981) (same); *DeBoles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir. 1977) (RLA case that, *contra* Pet., p. 32, explicitly holds that the DFR "extend[s] to union conduct in contract ratification voting"); *see James v. Int'l Bhd. of Locomotive Eng'rs*, 302 F.3d 1139, 1146, 1150 (10th Cir. 2002); *Sim v. New York Mailers' Union Number 6*, 166 F.3d 465, 468, 472 (2d Cir. 1999) (pertaining to re-ballot on previously rejected CBA); *Davenport v. IBT*, 166 F.3d 356, 361-62 (D.C. Cir. 1999); *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1387-88 (6th Cir. 1994); *O'Neill v. Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1201-03 (5th Cir. 1991) (following remand); *Baker v. Newspaper and Graphic Commc'ns Union, Local 6*, 628 F.2d 156, 166-67 (D.C. Cir. 1980); *Ryan v. New York Newspaper Printing Pressman's Union No. 2*, 590 F.2d 451, 456 (2d Cir. 1979). Plaintiffs' inexplicable citation to *White v. White Rose Foods*, 237 F.3d 174, 182 (2d Cir. 2001), Pet., p. 32, is not to the contrary.

[9] *James*, 302 F.3d at 1146; *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992); *Baker*, 628 F.2d at 166-67; *Leber v. Universal Music and Video Distrib., Inc.*, 225 F.Supp.2d 928, 948 (S.D. Ill. 2002); *see Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1170 (4th Cir. 1985); *Bates v. Bhd. of Locomotive Firemen and Enginemen*, 56 L.R.R.M. (BNA) 2274 (M.D. Fla. 1964).

1150; *Air Wisconsin Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990); *O'Neill*, 939 F.2d at 1201-03, 1205-06; *Jones v. Pepsi Cola Bottling Co.*, 822 F.Supp. 396, 403 (E.D. Mich. 1993), (b) the application of a uniform six-month statute of limitations for DFR claims, *DelCostello v. IBT*, 462 U.S. 151, 171-72 (1983), and (c) the limitations on the type and extent of damages available for DFR breaches, *Foust*, 442 U.S. at 47-53; *Vaca*, 386 U.S. at 195-98. Given this focus on federal labor law uniformity, the application of state law standards to union representational conduct "cannot be sustained," *Vaca*, 386 U.S. at 192-93; *accord Humphrey*, 375 U.S. at 341, 343-44 (DFR is "controlled by federal law," not state law); *see also infra* p. 21 n.13 (citing additional appellate and district court decisions). Allowing individuals to challenge a CBA's validity only upon a showing that their union breached its DFR in exercising its exclusive statutory authority maintains the uniformity of federal labor law and the RLA's detailed collective bargaining framework, *Jacksonville Terminal*, 394 U.S. at 378, and does not "superhybridize[]" or otherwise improperly limit employees' access to judicial redress, *contra* Pet., p. 22. *Infra* pp. 23-24 n.16.

The determination below that plaintiffs' state law claims are preempted rests squarely on this Court's governing case law. The lower court concluded, as did this Court in *Jacksonville Terminal*, that preemption was essential because the "'potentials for conflict, and for the imposition of inconsistent state obligations, are simply too great' to allow each State to regulate conduct central to Congress' RLA goals," Pet., p. 22a (quoting *Jacksonville Terminal*, 394 U.S. at 381). Its determination that "the imposition of additional state liability on the defendants for conduct during collective bargaining negotiations would upset the 'balance

of power' established by the RLA, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 . . . (1986), and 'frustrate effective implementation of the [Act's] processes,'" Pet., pp. 22a-23a (quoting *Jacksonville Terminal*, 394 U.S. at 380), again was drawn directly from this Court's teachings. So, too, was its conclusion that, given the core labor law issues at stake, the standard for judging the parties' conduct herein "'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme,'" and that "'[t]he needs of the subject matter manifestly call for uniformity.'" Pet., p. 22a (quoting *Central Airlines*, 372 U.S. at 691-92). These determinations, which provide the basis for the Second Circuit's preemption ruling, were faithful to this Court's labor law guidance; they struck no new ground. *See also* Pet., p. 110a (district court stating that preemption under RLA and NLRA "is driven by the need for uniform federal regulation of labor-management relations").[10]

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[10] Section 2, Eleventh of the RLA, 45 U.S.C. § 152, Eleventh, *contra* Pet., p. 35, is irrelevant to the preemption at issue here. In 1947, Congress amended the NLRA by, *inter alia*, adding Section 14(b), 29 U.S.C. § 164(b), to provide that state right-to-work laws were not preempted by the NLRA's allowance of union security clauses under Section 8(a)(3), 29 U.S.C. § 158(a)(3). When four years later Congress added Section 2, Eleventh to the RLA to permit union security clauses, *Beck*, 487 U.S. at 746, it made clear that, in contrast to the NLRA, RLA Section 2, Eleventh *would* preempt state right-to-work laws. *See Hanson*, 351 U.S. at 231, 232 & n.5; *Price v. UAW*, 927 F.2d 88, 92 (2d Cir. 1991). Congress neither stated nor suggested this meant RLA preemption would be limited to this narrow context; indeed, the contemporaneous debate reflects Congressional recognition that the RLA "has for a long time preempted the field." 81 Cong. Rec. 16371-78 (1950), *reprinted in* THE

C. The court below relied on this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), in precisely the same way that this Court did in another RLA case, *Jacksonville Terminal*: "for assistance" in "delineating" the type of union or carrier conduct that is governed by the federal labor law and therefore "protected against infringement by the States," in contrast to other situations where state regulatory interest is "compelling" (*e.g.*, union violence) or that is of peripheral concern to federal labor law. *Jacksonville Terminal*, 394 U.S. at 381-86 & n.19, 391 (quoting *Garmon*, 359 U.S. at 247, and citing to other NLRA cases); *accord* Pet., pp. 17a-19a (same, quoting *Garmon*, 359 U.S. at 241, 243, 244 & n.3, 246, 247). As this Court emphasized, *Garmon's* focus on the need to protect uniform federal labor law standards from state regulatory intrusion is just as applicable under the RLA as it is under the NLRA—notwithstanding that there is no RLA agency counterpart to the National Labor Relations Board ("NLRB"), *Jacksonville Terminal*, 394 U.S. at 384 n.19; Pet., p. 19a; *contra* Pet., pp. 25-27, 34-35—and therefore it is essential that union and carrier conduct pertaining to the formation of a CBA be governed exclusively by federal law, free of state regulation. 394 U.S. at 381. *Accord* Pet., pp. 22a-23a;[11] *Nellis v. Air Line Pilots Ass'n*, 805 F.Supp. 355, 360 n.5 (E.D. Va. 1992); *see Peterson*, 759 F.2d at 1168-69.

RAILWAY LABOR ACT OF 1926, A LEGISLATIVE HISTORY 1222 (Michael H. Campbell & Edward C. Brewer, III, eds., William S. Hein & Co.) (1988); *accord id.* at 16320-33 (statement of Sen. Thomas), *reprinted in* THE RAILWAY LABOR ACT OF 1926, A LEGISLATIVE HISTORY 1188.

[11] As the court below correctly noted, courts have applied the reasoning of *Jacksonville Terminal* and *Garmon* in a variety of RLA contexts. Pet., pp. 19a-23a; *see also* Pet., p. 110a.

The court below thus correctly concluded that underlying "the principles animating *Garmon, Jacksonville Terminal*, and their progeny" is a "concern with whether the particular state law at issue may 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" Pet., pp. 20a-21a (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), and that application of these principles required preemption of plaintiffs' state law claims.[12]

D. There is no inter-circuit conflict regarding the scope and effect of RLA and DFR preemption, *contra* Pet., pp. 33-34. Plaintiffs cite no case that permits prosecution of a state law claim that is premised on the same allegations as a DFR claim and challenges conduct that is governed by the DFR. To the contrary, the determination below that preemption is required where, as here, the state law claim rests on the same factual allegations as the DFR claims, Pet., pp. 22a-23a (Second Circuit), 90a (district court), is in

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[12] *Contra* Pet., p. 31 n.22, cases therein cited reflect that *Garmon* preemption is predicated on the need to safeguard uniform federal labor law standards and the "danger of state interference with [this] national policy." *E.I. DuPont de Nemours & Co. v. Sawyer*, 517 F.3d 785, 792 (5th Cir. 2008); *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 661 (7th Cir. 1992) (preemption analysis considers "risk that the state will approve conduct that the NLRA prohibits"); *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1287-88 (6th Cir. 1986) (state interest "properly overridden by the need to enforce a uniform federal labor law"); *United Credit Bureau v. N.L.R.B.*, 643 F.2d 1017, 1026 (4th Cir. 1981) ("paramount traditional consideration underlying the labor preemption doctrine [is] the danger of potential conflict between the state court and the Board specifically, . . . the 'danger of interference with federally protected conduct'") (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202-03 (1978)).

line with a long series of decisions, *e.g.*, *Nellis*, 805 F.Supp. at 360 (preemption required where state claim is a "mere refinement" of a DFR claim), *aff'd*, 15 F.3d 50 (4th Cir. 1994),[13] and in conflict with none.

The cases plaintiffs cite to suggest "disarray" among the circuits have nothing to do with union and employer conduct in the formation of a CBA that is at the heart of the present case. *See* JA-136 (prayer for relief). Because this case is about CBA formation, not

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[13] *Accord Cooper*, 349 F.Supp.2d at 508 (claim preempted if "based on the same conduct that would support" DFR claim); *Bensel v. Allied Pilots Ass'n*, 387 F.3d at 322 (DFR is an area "dominated by the sweep of federal statutes" and thus union representational conduct is "governed by federal law . . . rather than by local law"), *aff'g in part and rev'g in part on other grounds*, 271 F.Supp.2d 616, 629 (D.N.J. 2003); *May v. Shuttle*, 129 F.3d 165, 179 (D.C. Cir. 1997) (state law fraud claim "same as" DFR claim preempted); *Dunn v. Air Line Pilots Ass'n*, 836 F.Supp. 1574, 1580, 1584 (S.D. Fla. 1993) (claim that union disregarded its internal policy was "nothing more" than assertion of arbitrary and bad faith conduct that "clearly falls within the [DFR]" and is "preempted" and "governed exclusively by federal law"); *Griffin v. Air Line Pilots Ass'n, Int'l*, No. 93-C-719, 1993 WL 348568, *7-8 (N.D. Ill. Sept. 3, 1993) (state tort claim "based on the identical conduct underlying [DFR] claim" preempted due to "unacceptable threat of disruption to the scheme of federal labor relations" that could result from "conflicting standards"), *aff'd*, 32 F.3d 1079, 1084-85 n.2 (7th Cir. 1994); *Johnson v. UFCW, Local No. 23*, 828 F.2d 961, 967 (3d Cir. 1987); *Peterson*, 759 F.2d at 1169-71 (preempting state claims having "significant overlap" with DFR claim); *Steele v. Brewery and Soft Drink Workers Local 1162*, 432 F.Supp. 369, 375-76 (N.D. Ind. 1977) (state claim based on same conduct as DFR claim preempted); *see BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers*, 132 F.3d 830, 832 (1st Cir. 1997) (negligence claim challenging union's "representational" conduct preempted by DFR); *James*, 302 F.3d at 1150; *Condon v. Local 2944 United Steelworkers*, 683 F.2d 590, 594-95 (1st Cir. 1982).

interpretation, cases applying the distinct "*Norris/Lingle*"[14] preemption doctrine, Pet., pp. 33-34, that turn upon whether a state law claim requires interpretation of a CBA (a so-called RLA "minor dispute"), are irrelevant. *See also* Pet., pp. 113a-14a (district court noting that plaintiffs "obfuscate[] the difference between federal preemption over [formation of a CBA] under the RLA, which is at issue here, and federal preemption of disputes regarding the interpretation of collectively bargained agreements, which is not at issue"). Similarly irrelevant are decisions cited at Pet., pp. 33-34, holding that local laws prohibiting discriminatory employment practices or setting minimum substantive labor standards are not preempted;[15] these areas have long been recognized as unimpeded by the RLA. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963) (RLA does not preclude local laws prohibiting discriminatory hiring practices); *Terminal R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 6-7 (1943) (RLA does not preempt "the field of regulating working conditions themselves").

E. Plaintiffs assert that the court below erred in applying a "potential for conflict" standard rather

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[14] *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988).

[15] *Air Transport Ass'n v. City and County of San Francisco*, 266 F.3d 1064, 1076-78 (9th Cir. 2001) (local law precluding discrimination in provision of employee benefits by local government contractors). *Wisconsin Cent. v. Shannon*, 539 F.3d 751 (7th Cir. 2008) (Pet., p. 33), in which the court held that a state regulation of rail employee overtime pay was preempted by the Adamson Act of 1916, 49 U.S.C. § 28301, *id.* at 754-55, *contra* Pet., p. 33, also does not support plaintiffs' "circuit disarray" argument.

than requiring an "actual conflict" to find their state claims preempted. Pet., p. 35. Once again, however, plaintiffs fault the Second Circuit for adhering to the decisions of this Court. *See, e.g., Jacksonville Terminal*, 394 U.S. at 381 (preemption required because the "potentials for conflict [were] . . . simply too great to allow each State . . . to decide for itself" what law applies to an RLA dispute, quoted in part in Pet., p. 23a); *Vaca*, 386 U.S. at 178-79 ("potentially conflicting" state laws "cannot be permitted to operate" where the DFR governs); *Garmon*, 359 U.S. at 249-50; *see also Peterson*, 759 F.2d at 1169-70; *Condon*, 683 F.2d at 594-95.

In any event, as the court below correctly found, *contra*, Pet., p. 35, and as the Petition itself makes clear, the conflict here between state and federal law is not only potential but real. Pet., p. 23a. Plaintiffs offer as a reason against preemption that the exacting DFR standard, *e.g., O'Neill*, 499 U.S. at 76-78, is "virtually impossible to meet," Pet., p. 24. If true, that only serves to demonstrate precisely why preemption is necessary here and why the decision below is fully consistent with established case law. Plaintiffs are unable to succeed not because of preemption, but because, as the courts below found, there was no evidence to support the five DFR claims that plaintiffs asserted against both defendants. Pet., pp. 24a-29a, 89a-90a; *see* JA-87-94 (¶¶ 241, 257, 267, 277, 291).[16] To permit plaintiffs, nevertheless, to

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[16] In appropriate cases, and *contra* Pet., pp. 22-23, 34-35, claims can be pursued and relief ordered against both a union and an employer for a DFR breach. *See, e.g., Davenport*, 166 F.3d at 361-62; *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985); *Jones v. Trans World Airlines*, 495 F.2d 790, 798 (2d Cir. 1974); *see generally Vaca*, 386 U.S. at 196-97 & n.17; Pet., p. 14a (Second Circuit

apply a less demanding state law standard and obligations to this same evidence would be to sanction precisely what the carefully constructed DFR preemption doctrine is intended to avoid—the elimination of "the rationality and symmetry the Supreme Court has finally brought to the [DFR] law," *Peterson v. Kennedy*, 771 F.2d 1244, 1259 (9th Cir. 1985); *see also Jacksonville Terminal*, 394 U.S. at 378-81 (uniform federal labor law scheme "would become meaningless" if state law could apply and present potential conflict); *Lockridge*, 403 U.S. at 285-86 (federal labor law preemption is needed "to avoid conflicting regulation" of unions and employers); *supra* pp. 14-18.

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In sum, there is no divergence between the decision below and the labor law preemption decisions of this Court or other circuits that warrants Supreme Court review.

II. THE DETERMINATION BELOW THAT PLAINTIFFS HEREIN HAVE NO PRIVATE RIGHT OF ACTION UNDER SECTION 2, FIRST AND 2, SEVENTH OF THE RLA CREATES NO CONFLICT WARRANTING REVIEW

There also is no conflict among the circuits or other extraordinary reason to review the dismissal of plaintiffs' claims under RLA Section 2, First and Seventh, 45 U.S.C. § 152, First and Seventh.

A. Section 2, First addresses the obligation of carriers and unions to make every reasonable effort to

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rejecting argument that DFR preemption left plaintiffs without a remedy).

make and maintain agreements. Section 2, Seventh prohibits unilateral changes by carriers in terms and conditions embodied in CBAs prior to exhaustion of the RLA's bargaining procedures. Fundamental principles of federal labor law and the text and structure of the RLA, as the Second Circuit correctly concluded, preclude an individual employee right of action under Section 2, First or Seventh where, as here, the employees are represented by a union and the claims are directed at the collective bargaining conduct of the union and the employer. Pet., pp. 9a-16a.

Under the RLA (as under the NLRA), once employees are represented by a union, their individual interests necessarily are "subordinate[d]" to the "collective interests of all employees in [the] bargaining unit," *Vaca*, 386 U.S. at 182, and it is the union, alone, and not individual employees, that can negotiate and conclude CBAs. *Steele*, 323 U.S. at 202 (under RLA); *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 347 (1944) (under RLA); *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 339 (1944) (under NLRA); Pet. pp. 11a-12a (citing *Steele*).[17] Here, APFA exercised this authority by negotiating, through the RPA, changes to the existing 2001 CBA.

The purpose of the RLA status quo requirements is to encourage peaceable settlement of labor controversies and prohibit *unilateral* conduct that could

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[17] *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945), concerned, unlike here, a so-called RLA "minor dispute" (pertaining to a dispute over the meaning of CBA provisions). It lends no support to plaintiffs, *contra* Pet., pp. 16-17. To the contrary its statement that the RLA "vests *exclusive* authority to negotiate and to conclude agreements . . . in the duly selected [union]," 325 U.S. at 722-24, 728 (emphasis added), is fully consistent with the decision below.

disrupt interstate travel (*e.g.*, a strike or a carrier's unilateral alteration of terms and conditions of employment that could provoke a strike) prior to exhaustion of the RLA's statutory bargaining processes. *Detroit and Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148-53 (1969); *Jacksonville Terminal*, 394 U.S. at 378; 45 U.S.C. § 152, First (status quo obligation imposed "in order to avoid any interruption to commerce or to the operation of any carrier"); *see Virginian Ry. Co. v. Sys. Fed'n, No. 40*, 300 U.S. 515, 548 (1937) (RLA "aimed at securing settlement of labor disputes"); *Texas & N. O. R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (RLA intended to protect interstate commerce from disruptions caused by labor disputes). The entry of APFA and American into the RPA furthered these objectives. Because American did not unilaterally alter the existing contractual terms, there was no status quo violation. The fact that these negotiated changes of the RPA were accomplished during the term of an existing CBA is of no import; the RLA "explicitly allows the parties to alter the status quo *by agreement*." *Air Line Pilots Ass'n, Int'l v. Pan Am World Airways, Inc.*, 765 F.2d 377, 381 (2d Cir. 1985) (emphasis in original); *accord Hendricks v. Air Line Pilots Ass'n, Int'l*, 696 F.2d 673, 677 (9th Cir. 1983) (*quoting Watson v. IBT*, 399 F.2d 875, 879 (5th Cir. 1968)); American Bar Ass'n, THE RAILWAY LABOR ACT 323 (Michael E. Abram, *et al.*, eds., 2d ed. 2005).

If, as was not the case, American had unilaterally altered the terms and conditions of employment, it would be APFA, the other party to the bargaining relationship, that would be authorized to sue to enforce American's RLA status quo obligations. *See Chicago and N.W. Ry. Co. v. United Transp. Union*,

402 U.S. 570, 575-79 (1971) (Congress intended Section 2, First to be "enforceable" by carriers and unions); *see also* cases referenced *infra* pp. 28-29 n.22 (citing cases where a union or carrier sued to enforce status quo obligations). This follows from the Union's status as exclusive bargaining representative, not, *contra* Pet., pp. 15-18, 20-22, because of the "associational standing" doctrine.[18]

As the Second Circuit correctly observed, permitting disgruntled employees to invoke the RLA status quo provisions to challenge the product of collective bargaining—here, a CBA reached by APFA and American, and ratified by the employees—"would risk the very disruption in commerce that the RLA seeks to avoid," Pet., p. 14a, and be "[in]consistent with the underlying purposes of the [RLA's] legislative scheme": to promote labor peace, *Cort v. Ash*, 422 U.S. 66, 78 (1975); Pet., pp. 12a-14a; *accord Bensel*, 387 F.3d at 319 (allowing individual employees to challenge CBAs "would undermine the [RLA's purpose] of providing for an organized process of negotiation between one employee representative and the employer, and could lead to chaos").[19]

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[18] Plaintiffs assert some impropriety in having the potential claims of retirees within their purported class left to APFA to pursue, Pet., pp. 20-22, but that has no applicability here. The RPA made no changes to the flight attendants' retirement plan and did not affect any allegedly accrued retiree entitlements. JA-435; JA-1335-36; JA-3526; JA-3625-26; *see* Pet., p. 46a; JA-3680. Furloughed flight attendants are covered by the CBA and thus represented by APFA; *contra* Pet., p. 20, they are not "former employees."

[19] *Contra*, Pet., p. 19, the Second Circuit concluded that plaintiffs lack standing to pursue their RLA claims against American based on the wording, structure and purposes of the RLA, Pet., pp. 9a-10a, 16a, not on any notion that a union "inherently lim-

B. Contrary to Pet., pp. 12-13, no court decision, including those cited by plaintiffs, conflicts with the standing determination of the Second Circuit. *See Bensel*, 387 F.3d at 317-19 and n.4 (finding no cases supporting an implied right in individual employees to pursue claims under Sections 2, First, Second and Ninth of the RLA). The decisions cited by plaintiffs are addressed to entirely distinct and readily distinguishable matters: (1) claims under RLA Section 2, Third and Fourth, 45 U.S.C. § 152, Third and Fourth,[20] which (unlike Section 2, First and Seventh) are intended to safeguard individual employees' rights to join and support a union, *see* Pet., pp. 10a-11a (Second Circuit distinguishing Section 2, First from Section 2, Third and Fourth "for which [individual employee] private rights of action have been recognized"); *Bensel*, 387 F.3d at 318 (same); (2) RLA minor disputes,[21] which, as noted, *supra* pp. 21-22, are unrelated to the issues here; (3) claims brought by the union or carrier, not by individual employees;[22]

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its . . . its members' right to sue," Pet., p. 19. APFA placed no limitations on plaintiffs' right to sue and Section 101(a)(4) of the LMRDA (which prohibits labor organizations from "limit[ing] the right of any member thereof to institute" a lawsuit, 29 U.S.C. § 411(a)(4)) has no applicability here.

[20] Pet., pp. 12-13: *Lebow v. Am. Trans. Air Inc.*, 86 F.3d 661 (7th Cir. 1996); *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922 (1st Cir. 1983); *Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970); *see also Texas & N. O. R.*, 281 U.S. 548 (RLA § 152, Third judicially enforceable by union).

[21] Pet., pp. 13-14 and n.7: *Kushto v. Bhd. of Ry. Airline & S.S. Clerks*, 818 F.2d 290 (4th Cir. 1987); *Kaschak v. Consol. Rail Corp.*, 707 F.2d 902, 908, 910 (6th Cir. 1983); *Hilbert v. Pennsylvania R.R. Co.*, 290 F.2d 881, 885 (7th Cir. 1961).

[22] Pet., pp. 12-14 and n.6: *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299 (1989) (suit by union); *Chicago &*

or (4) claims which, unlike those presented here, challenge conduct of unions that were not the plaintiffs' exclusive representative and thus which did not implicate the DFR.[23] The Second Circuit's

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N.W. Ry. Co., 402 U.S. 570 (employer suit against union to enjoin strike); *Detroit & Toledo Shore Line R.R. Co.*, 396 U.S. 142 (same; union counterclaimed); *Order of R.R. Telegraphers v. Chicago. & N. W. Ry. Co.*, 362 U.S. 330 (1960) (employer suit against union to enjoin strike); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946) (suit by union that required CBA interpretation; referred to Adjustment Board); *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944) (suit by union); *Virginian Ry. Co.*, 300 U.S. 515 (suit by union under Section 2, Ninth); *IAM v. Transportes Aereos Mercantiles Pan Americanados, S.A.*, 924 F.2d 1005 (11th Cir. 1991) (suit by union); *United Transport. Union, Local 63E v. Penn Cent. Co.*, 443 F.2d 131 (6th Cir. 1971) (same); *Southern Ry. Co. v. Bhd. of Locomotive Firemen & Enginemen*, 384 F.2d 323 (D.C. Cir. 1967) (same); *United Indus. Workers v. Bd. of Trs. of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965) (same); *Railroad Yardmasters v. Pennsylvania R.R. Co.*, 224 F.2d 226, 227 (3d Cir. 1955) (same); *see Regional Airline Pilots Ass'n, Inc. v. Wings West Airlines, Inc.*, 915 F.2d 1399 (9th Cir. 1990) (same; also including Section 2, Third and Fourth claims that individuals may appropriately assert, *supra* p. 28); *Carbone v. Meserve*, 645 F.2d 96, 98, 100 (1st Cir. 1981) (suit by union; dispute concerning an alleged CBA breach, as in the cases noted *supra* n.21, and not "relate[d] to the formation or modification of the [CBA]"). In *Mungin v. Florida East Coast Ry. Co.*, 416 F.2d 1169 (5th Cir. 1969) (Pet., p. 14), employees challenged the carrier's refusal to reinstate them pursuant to a status quo injunction obtained by the government after their union, acting without authority and in breach of "its duty of faithful representation" (unlike the situation here), agreed that the carrier need not reinstate them. *Id.* at 1172-74, 1178.

[23] Pet., p. 14: *Bhd. of R.R. Trainmen v. Smith*, 251 F.2d 282 (6th Cir. 1958) (union that was not the employees' representative sought employee's discharge through enforcement of its union shop agreement); *Dwellingham v. Thompson*, 91 F.Supp. 787 (E.D. Mo. 1950) (dispute resolution between carrier and

conclusion that plaintiffs cannot challenge the product of collective bargaining negotiations by directly suing their employer where, as here, their bargaining representative fulfilled its DFR in entering the challenged CBA is consistent with all other authorities and the wording and structure of the RLA and there is no reason to review it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 28, 2010

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union that was not the employees' bargaining representative resulted in displacement of the employees), *aff'd sub nom., Rolfes v. Dwellingham*, 198 F.2d 591 (8th Cir. 1952).